IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1957.

No. 973

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

PETITIONER'S REPLY BRIEF.

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General Statement:

Though petitioner's reply brief will be devoted principally to the correction of erroneous statements believed to be of a material character in respondents' brief, a short discussion will follow of petitioner's claim that the Court of Appeals sanctioned a serious departure by the trial court from the accepted course of judicial procedure requiring the exercise of this Court's power of supervision.

Respondents have brushed aside or lightly treated petitioner's claims that he has been denied a fair or prompt hearing in the trial Court. But the denial of petitioner's procedural rights were not lightly made by him. They are not of an inconsequential or isolated character. The following summary discloses that taken together they are of great substance and reach many vital phases of a litigant's rights at a trial.

1. June 10, 1957 Subpoena quashed as to items 5-7. (R. 42) Production of records relating to granting of annuities under pertinent provision of annuity plan denied.

2. June 10, 1957, July 30, 1957, August 9, 1957. Hearing on Motion for Preliminary Injunction refused.

3. July 30, 1957—August 9, 1957. Opportunity to present oral testimony on motion denied.

4. July 16, 1957 First series of interrogatories filed. (R. 84 ff) No answers filed by defendants to any of them —delay of 10 months to date. (See pp. 8-9 herein)

5. July 24, 1957 Amendments to Complaint as Amended filed—delay of 4½ months until defendants "voluntarily" withdrew objections on December 11, 1957.

6. September 10, 1957 Notice of Deposition of Dr. Lounsbury and two directors—delay to date over 8 months.

7. September 11, 1957 Second Interrogatories filed—7 in number, delay of over 8 months to date.

8. September 13, 1957 Defendants presented and Court approved demand of defendants to stay all discovery—delay of 8 months since filing of plaintiff's objections to Court order.

9. December 11, 1957 plaintiff denied permission to file Motion to assess costs against defendants for dilatory action with respect to amendments filed July 24, 1957.

Surely the above incidents go to the root of petitioner's rights to a fair and prompt trial. He had no hearing under respondents' annuity plan and was unaware until two years after retirement of the basis of respondents' action. The primary purpose of the annuity plan was to pay an annuity during the remaining lifetime of a former employee. Undue delay here is irreparable injury.

But the charges of unfair treatment, and bias made by petitioner in the Court of Appeals were also predicted upon the knowledge of petitioner's counsel that the trial judge (Knoch) in two other suits(1) involving major utilities with but one exception apparently granted plaintiffs only those procedural rights voluntarily conceded by defendants. This identical but regrettable pattern was followed in this suit and surely represents a serious departure from the accepted and usual course of judicial procedure.

Respondents' Misstatements.

1. Respondents stated, pg. 4, that:

"On that date, (July 30, 1957) Judge Knoch stated that on the basis of the complaint and answer it was his opinion that the motion for preliminary injunction should be denied (R. 100-102). *He gave petition-*

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(1) *Williams* v. *Western Electric Co., et al.* No. 55 C 472. U. S. Dist. Court, No. Dt. Ill. E.D. This was also a suit by an employee for a service annuity. After the Court refused to allow an appeal under 28 US C 1915 plaintiff accepted a nominal settlement. In *Weinhaus* v. *Gale, et al* affirmed 237 F 2d 197 the trial judge allowed a one sentence amendment over objections of defendants. This is believed to be the only instance in the three cases where a plaintiff was allowed procedural rights by this trial judge not objected to by defendants with possible minor exceptions. The trial judge disposed of defendants' motion to dismiss it 3 days after argument in the *Williams* case and in 2 days in the *Weinhaus* case.

er an opportunity, however, to submit a memorandum on the question (R. 96 and 102)." (Italics added)

This statement is incorrect. The Court plainly allowed but 3 days for the filing of a brief as to whether plaintiff was entitled to a hearing on his motion for preliminary injunction. This privilege was accorded him only after the Court denied the motion on the merits and refused to set the motion for any hearing though he had this question under advisement for over two months. The order of the Court (R. 96) in part follows:

> Ordered that leave be and it hereby is given to the plaintiff to file brief on or before August 2, 1957 *in support of his motion to set this cause for hearing on his motion for a preliminary injunction* • • •" (Italics added)

Is this accepted and usual course of judicial procedure? We think not. Nor is it a matter of inconsequence.

2. The statement by respondents (pg. 3) that

> "respondents furnished to counsel for the petitioner copies of most of the documents sought including the whole of the company file as to petitioner • • • On June 10, 1957 the district court quashed the subpoena duces tecum with respect to the remaining items sought (R. 42)."

The first statement is incorrect. The principal documents sought in the subpoena were records relating to the granting of service annuities under the controversial third paragraph of Sec. 4 including the construction by the defendants of this paragraph. Items 5-7 subpoena was refused by defendants then and throughout the case and sustained by the trial court. Respondents voluntarily made available part of their file relating to petitioner's record and historical changes in the annuity plan, but have persistently refused to produce any records disclosing the meaning of the terms:

"Any employee who shall not have attained the age of 65 while in service may * * * be retired, *on account of permanent disability or for any other reason.* * * *"

The crucial parts of the subpoena quashed were (R. 25, 42):

"5. All minutes, memoranda, correspondence, decisions, of any kind whatsoever of the benefit committee relating to the granting or denial of any Service Annuity under the third paragraph of Sec. 4 of the Service Annuity System during the period (a) January 1, 1954 to September 30, 1954 inclusive, (b) January 1, 1952 to December 31, 1953 inclusive and (c) October 1, 1954 to December 31, 1955."

6. (Same as 5 except minutes of directors were requested).

"7. All documents, memos, letters, correspondence of any kind involving the construction of the third paragraph of Sec. 4 of the Company Service Annuity System in effect on September 30, 1954."

It is these records which petitioner endeavored to secure since May, 1957 by subpoena and other discovery measures and has so far been denied. Without them he cannot try his case or answer the motion for summary judgment and he has been granted nothing on this issue as on any other not voluntarily conceded by defendants.

3. The respondents' statement (p. 5) that:

"On September 12, 1957, respondents filed a Motion for summary judgment supported by more than one hundred (100) pages of detailed factual information with respect to the petitioner and his claim, *all of which, contrary to petitioner's assertion (Petition p. 13) were set forth under oath.*"

This statement is incorrect, we believe. The motion consists of five affidavits and 30 exhibits. These exhibits were largely prepared by persons other than affiants.

The five affiants could not swear to nor did they as to the truth of alleged material facts for which others were

primarily responsible. Petitioner on September 23, 1957 filed his memo advising the trial Court it was necessary to proceed with discovery as to much of such unsworn data and other records.

In his objections to defendants' Motion to Stay Discovery, petitioner said in part:

> c. "Plaintiff requires the completion of the pending discovery in order to secure necessary facts for the purpose of contesting the untrue statements contained in the affidavits and exhibits attached to defendants' motion for summary judgment. • • •
>
> d. "The examination of affiant Baxter is necessary under the discovery rules of this Court with respect to par. 14-18 inclusive of his affidavit, of C. E. Parker with respect to all phases of his affidavit, of Exhibit 10 for the purpose of enabling plaintiff to secure access to the files in the material of the three offices shown therein; of H. W. Christy for the purpose of examining him upon his medical qualifications and medical terms and conclusions, and exhibits 11, 12, 16, 17 and 18 and for R. B. Gear on his affidavit and Exhibits 20-24 inclusive.
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> e. "The aforesaid affidavits and exhibits reveal that numerous other employees of the defendants have vital information relating to the issues raised by defendants' motion and many of such persons will have to be examined by plaintiff under the discovery rules. Such persons are identifiable only by initials in some cases such as EWG, WAJ, MT, SLT, (Ex. 18), W. L. Marks, E. E. Patton, etc. (Ex. 22), Auringer, Denager, Marks, Leister or Huston (Ex. 23), Ray Kruse • • • (Ex. 24).
>
> j. "The deposition of Lounsbury, the defendants' medical director, should be taken in view of the importance of his determination, the responsibility of his position and the complex and untrue character of his conclusions. • • •"

It is indeed strange that defendants should still insist on the completely sworn character of their motion, affi-

davits and exhibits. In his affidavit R. B. Gear states that Schlosser's duties involved "purchase of equipment for major construction projects * * * possibility of speeding construction to meet the company's construction program * * * to visit vendor's factories and shops. * * *" President J. W. Evers, and head of respondents' Annuity Committee in the only deposition taken in the case, contradicts this statement for he said (pg. 22) Schlosser's functions did not "include machinery or equipment" but "furniture and supplies".

And Evers also stated under oath (pg. 23) that he first knew of the Schlosser matter in 1956, two years after Edison refused him a pension but Exhibit 22 attached to defendants' motion, contains this note; "OK'd by Mr. Evers 9/22/54." It is this exhibit in which Gear states that if Schlosser "does not report for work in one week from that date, we will consider that he has resigned".

It is thus clear why respondents desire to block further discovery by petitioner. Petitioner wonders what ruling might have been made by an informed and impartial annuity committee on his application after a fair hearing.

4. The statement that (pg. 5):

> "The Court ordered petitioner to answer the motion for summary judgment and motion to stay all discovery proceedings within ten days, took the motions under advisement, and further ordered that the depositions scheduled for September 16, 1957 be held in abeyance."

When the defendants presented their motion for summary judgment, they failed to comply with the trial court rule requiring that it be supported by a brief. (Rule 13) Plaintiff stated he could not answer the motion for a summary judgment until the Court determined whether he could first have discovery on factual issues raised by defendants' motion. It was this, and this alone, that he

was allowed ten days to file a memo on and this he did. It is unbelievable that the trial Court would allow him only ten days to file answers to a motion for a summary judgment of over 100 pages. Defendants did not then request such an order.

5. Respondent's statement (p. 7) that the District Judge "heard arguments and considered briefs on the sufficiency of Petitioner's claims" has already been shown to be incorrect.

The July 24, 1957 Interrogatories. (R. 84 ff)

Since the record was not printed we reproduce some of the original 38 interrogatories all of which defendants objected to. Among such interrogatories are the following:

"3. What rules other than the Plan itself had been issued since he was employed which govern in any way their administration of the Plan, and (1) list all such rules or regulations; (2) attach copies or (3) make them available.

4. Are all the Edison and affiliated company letters and documents relating to the employment and retirement from employment including his medical history file in full, the documents, etc., which Mr. Cronin made available for examination to counsel for the plaintiff on Friday, June 7, 1957. If there are any others in the file of the company, please list them by description and dates.

5. (a) Has the company at any time in any published document prior to the retirement of Mr. Schlosser, advised its employees that:

> "In 1954 as at present, a person is entitled to disability retirement only by virtue of competent doctors stating that an employee is unable to perform any services."

(b) If the answer is yes, list all documents published by Edison during the employment of the plaintiff which announced that the above statement represented Edison policy.

(c) When did it first so advise the plaintiff.

7. Is Edison able to state that at no time between the employment of the plaintiff on June 11, 1925 and October 3, 1956, the date of the Parker letter, that no person was ever given a disability annuity under the annuity plan if (unless) "competent doctors (stated) that an employee is unable to perform any services."

8. If the answer is in the negative, state the exceptions.

9. If the answer is in the affirmative, state upon what authority the answer is given.

13. What does the term "permanent disability" mean as defined in the plan.

14. List all documents, statements and correspondence of any kind where the term has been defined or construed by Edison. Will you supply copies of such documents or make them available for plaintiff's examination.

15. What regulations, if any, have been issued defining the term, "permanent disability". Will you supply copies of such documents or make them available for plaintiff's examination.

16. What regulations, if any, have been issued defining the term "for any other reasons". Will you supply copies of such documents or make them available for plaintiff's examination.

19. List the illnesses which are considered in determining the granting of the service annuities within the terms "permanent disability".

20. Is heart disease one of such elements.

21. What type of heart disease is considered as qualifying a person for a service annuity under this proviso.

30. Name the physician who determined the standards of "permanent disability", in Section 4 of the Annuity Plan.

34. What methods did the defendant employ to notify its employees, including the plaintiff, of the terms and conditions under which (a) service annuities generally were made available to them or (b) service annuities under the 3rd paragraph of Section 4."

Conclusion.

Petitioner has been denied a fair and prompt hearing in the trial court. The Court of Appeals sanctioned a vital departure from the accepted and usual course of judicial procedure. This court should therefore grant this Petition.

Respectfully submitted,

HARRY R. BOOTH,

Attorney for Petitioner.